

HAZEL E. KINCAID

IBLA 76-403

Decided June 23, 1976

Appeal from decision of the Oregon State Office, Bureau of Land Management, rejecting domestic water pipeline right-of-way application OR 13861.

Affirmed.

1. Act of February 15, 1901--Rights-of-Way: Applications

A Bureau of Land Management decision rejecting an application under the Act of February 15, 1901, for a domestic water pipeline right-of-way will be sustained where it was made in due regard for the public interest.

APPEARANCES: Jack M. Vaughan, Esq., attorney in fact, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Hazel E. Kincaid has appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated December 8, 1975, rejecting her application (OR 13861), filed pursuant to the act of February 15, 1901 (43 U.S.C. @ 959), for a domestic water pipeline right-of-way across national resource lands in the NW 1/4 SW 1/4 sec. 21, T. 33 S., R. 5 W., Willamette Mer., Josephine County, Oregon. The application was rejected for the following reasons:

Increased water use for irrigation and domestic consumption have reduced stream flow in summer months to a trickle in a number of Coyote Creek's tributaries, and much of lower Coyote Creek is reduced to stagnant pools from lack of water.

Coyote Creek and its tributaries serve as spawning and rearing habitat for steelhead and resident trout. The August 1974 stream survey showed that lack of water quantity and quality is the most serious limiting factor

to salmonoid fish survival in the Coyote Creek drainage system. The water source does not meet the Oregon State standards for human consumption and would be a risk to health without treatment.

The Secretary of the Interior management policy includes the obligation to manage public lands for fish and wildlife development and utilization to obtain a sustained yield of fish and wildlife resources (43 CFR 1725.3-3(b)).

In her statement of reasons on appeal, appellant argues that her water right has existed for many years, that a decline in fish population is probably due more to the increasing number of fishermen in the area rather than diminished water quantity, and that while the government may believe that the creek waters are not fit for human consumption, she and others before her have "lived and raised families on this water without sickness or incident * * *." She also urges that since many people are using and will continue to use the water in question, the only issue is point of diversion, and the BLM should grant the right-of-way because a diversion point on public land along the creek above residences is preferable to one below the residences which would require pumping water from the creek where it runs across private property, "which will have to be done without the applied for right of way."

[1] Pursuant to the Act of February 15, 1901, supra, the Secretary of the Interior is granted discretionary authority to permit, inter alia, the use of rights-of-way across public lands to supply water for domestic purposes. Scott Hampson, 18 IBLA 230 (1974); William A. Lester, 2 IBLA 172 (1971). In the exercise of his discretion, the Secretary may reject a domestic water right-of-way application when approval would be contrary to the public interest. Scott Hampson, supra; William A. Lester, supra.

Appellant's proposed right-of-way crosses Oregon and California Railroad lands, title to which was reverted in the United States by the Act of June 9, 1916, 39 Stat. 218. By virtue of the Act of August 28, 1937, 50 Stat. 874, all applications for rights-of-way for the construction and operation of any project crossing Oregon and California (O&C) reverted railroad lands must be accompanied by a statement showing "that favorable action on the application will not adversely affect or impair watershed protection, streamflow regulation, and other conservation features * * *." 43 CFR 2801.1-8(a). 1/ Appellant's application was not accompanied by

1/ The general rights-of-way statutes were extended to Oregon and California reverted railroad lands by section 2 of the Act of June 9, 1916, 39 Stat. 218, 219.

such a statement. We note, however, that by an earlier decision, dated March 24, 1975, appellant's application was held for rejection based upon certain defects in the application. These defects were remedied after notification by BLM to appellant, but the notification did not include information pertaining to the requirements of 43 CFR 2801.1-8(a). We find that appellant's statement of reasons, which addresses conservation issues, satisfies the regulatory requirement. However, we conclude that her allegations are insufficient to justify issuance of a right-of-way permit.

In response to appellant's right-of-way application, the BLM developed a land report, an Environmental Analysis Record, a water quality report, and individual reports from staff specialists in fisheries and wildlife biology. The water quality report stated that the creek's "water shows contamination and does NOT conform with accepted bacteriological standards of purity for drinking water." The other reports reiterate the findings stated in the BLM decision, namely, that diversion of water from the creek is adversely affecting summer stream flow thereby creating critical impacts to salmonoid fry in Coyote Creek.

The BLM determined that the United States had an obligation to conserve waters crossing public lands in order to protect downstream aquatic life. 43 CFR 1725.3-3(b). The BLM also did not wish to authorize a diversion of water which could adversely affect human health due to its impure quality. The crux of appellant's counter-argument is that diversion and consumption will occur in any case and, therefore, the BLM should facilitate the process by granting the right-of-way. While the Federal Government cannot control diversion of stream flow from private lands, it does have a responsibility to promote environmental health and welfare with regard to the use of waters crossing public lands. 2/ Accordingly, we do not find appellant's arguments to have merit and we therefore affirm the BLM's decision. 3/

2/ The need and purpose of legislation which became the Act of February 15, 1901, were stated as follows:

"The several acts relating to [rights-of-way for canals, ditches and reservoirs] should be brought together and harmonized in a new act, the terms of which should be broad and comprehensive enough to afford the widest possible use, for all beneficial purposes, of the waters on the public lands and reservations of the United States, so long as the same is consistent with the preservation of the public interests and the attainment of the purposes for which the various reservations are established.

[Emphasis in original.]

Quoted in "Rights-of-Way for Ditches and Canals" Acting Solicitor's Opinion, 58 I.D. 29, 32 (1942).

3/ The BLM reports indicate that appellant and others are presently diverting water across national resource lands without authorization and that there is an existing water storage tank on O&C lands which serves appellant's residence and one other. We inform appellant that "Any occupancy or use of the lands of the United States without authority will subject the person occupying or using the land to prosecution and liability for trespass." 43 CFR 2801.1-4. Scott Hampson, supra at 233.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo

Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Joan B. Thompson
Administrative Judge

